No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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OPENING BRIEF FOR APPELLANT.

James Arena, hereinafter referred to as appellant, was indicted on June 3, 1953, in the United States District Court for the Northern District of California (hereinafter referred to as the "Court below") and purportedly charged with perjury committed before a Federal Grand Jury (Title 18 U.S.C., Section 1621). Following a trial by jury, appellant was convicted and sentenced to three years imprisonment (R. 33-34).

This is an appeal from the judgment of that Court entered on August 11, 1954. Notice of appeal was filed on August 11, 1954 (R. 35). The appeal was timely.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of the District Court:

Title 18, U.S.C., Section 3231, provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

The statute sustaining jurisdiction:

Title 18 U.S.C., Section 1621, provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

2. The jurisdiction of this Court upon appeal:

Title 28, U.S.C., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, U.S.C., Section 1294 (1) provides:

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

3. The pleadings necessary to show the existence of jurisdiction:

(a) The indictment (R. 3-7)

(b) The motion to dismiss indictment (R. 12-15)

(c) The order of the Court below denying the motion to dismiss indictment (R. 8)

(d) The motion in arrest of judgment (R. 31)

(e) The order denying motion in arrest of judgment (R. 32)

(f) The judgment and commitment (R. 33, 34)

(g) The notice of appeal (R. 35)

(h) Statement of points on appeal (R. 243-247).

4. The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:

In the introductory portion of this brief, these facts have been concisely stated and will be treated more fully in the subsequent development of the facts of the case. Thus, to avoid repetition, the statement is omitted here.

STATEMENT OF THE CASE.

The indictment.

The Grand Jury returned an indictment in the Court below charging appellant in two counts with violations of Section 1621 of Title 18 U.S.C. The Court entered a judgment of acquittal on the second count. The only count that need be considered is the first count.

This count alleges as follows:

> "(1) That on the sixth day of May, 1953, the United States Grand Jury for the Northern District of California, Southern Division, March, 1953, term, engaged in the hearing of the matter of income tax liability of Arthur H. Samish and Frank X. Flynn, in the United States Courthouse and Post Office Building, San Francisco, California, within the jurisdiction of this Court, called before it as a witness James Arena, the defendant herein, who took an oath, administered to him by Charles W. W. St. John, Foreman of the Grand Jury, that he would testify to the truth, the whole truth, and nothing but the truth, and then and there gave testimony including that which will be particularly referred to hereafter in this indictment.
>
> (2) That at the time of the administering of the oath, and at the time of the giving of the testimony, as above stated, the Grand Jury was conducting a hearing which was authorized by law; it was a competent tribunal before which such oath might be administered and such testimony given; its Foreman who administered the oath was authorized to do so; and the hearing was a case in which the law authorized such oath to be administered.
>
> (3) That on May 6, 1953, at San Francisco, in the Southern Division of the Northern District of

California, within the jurisdiction of this Court, under the circumstances above set forth, James Arena, late of Oakland, California, wilfully, knowingly, and contrary to his oath, testified in a material matter, in answer to questions propounded at said proceedings, as follows:

Q. (by Mr. Olney). I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollars bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turned counted the $38,000 in these one thousand dollars bills to you and give you the bills.

A. I didn't get them, sir.

Q. Did that happen? A. No, sir.

Q. Anything like it? A. No, sir.

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you? A. No, sir.

Q. Even one cent? A. Never had occasion to.

Q. (by Mr. Burke). Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

Q. (by the Foreman). Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin? A. No, sir.

(4) That in truth and fact, as the defendant James Arena then and there well knew and believed, the foregoing testimony was false.

(5) That the questions asked and the testimony of the defendant, heretofore alleged, were material to the proceedings then being conducted by the Grand Jury, and the testimony of the said defendant, by reason of its falsity and known untruthfulness, so known to the defendant, did thereby impede and dissuade the Grand Jury in performing an expeditious inquiry."

Statute involved.

The indictment purports to be drawn under the provisions of Section 1621 of Title 18 U.S.C. the provisions of which have heretofore been quoted on page 2 hereof.

Other pleadings and motions.

Upon the return of the indictment, appropriate and timely pleadings and motions were filed by appellant. These were a motion for disclosure of matters occurring before the Grand Jury (R. 9), motion for bill of particulars (R. 10-12), motion to dismiss the indictment (R. 12-15) and petition and motion to suppress evidence (R. 19-21). These motions were supported by affidavits from appellant (R. 16-19 and R. 22-23).

The various motions were argued to the Court on July 22, 1953, and were, with one exception, denied. The order of denial read as follows:

"After hearing counsel, it is ordered that the motion to disclose the testimony of defendant before the Grand Jury be granted; the motion to dismiss for discovery, etc., for bill of particulars and to suppress evidence be and each of them is denied."

Thereupon, the defendant entered a plea of "Not Guilty." The trial commenced on July 19, 1954, and terminated with a verdict of guilty on Count One of the indictment on July 21, 1954. In the course of the trial and at the close of the evidence the Court below granted the motion of appellant's counsel for judgment of acquittal on Count 2 of the indictment and denied the said motion on Count 1 thereof. In the course of the trial and at the conclusion of the evidence presented by plaintiff the Court below granted the motion to strike the testimony of the witness, Jack Roland, and to strike Exhibit 14, but denied the motions to strike the testimony of the witnesses, Fred Whitted, Rosalyn Heller and Earl Madieros and the motions to strike Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15.

Following the verdict of guilty, appellant moved the Court below to set aside the verdict of the jury and enter judgment of acquittal and in the alternative that the verdict of guilty be set aside and a new trial ordered (R. 28-31). This motion and a motion in arrest of judgment (R. 31) were denied (R. 32).

The judgment and commitment of the Court below was entered on August 11, 1954 (R. 33) and notice of appeal was filed the same day (R. 35).

The evidence.

In order to inform this Court with definiteness of the precise nature of the evidence offered and received at the trial in the Court below, upon which is predicated the verdict of guilty, a detailed statement of the testimony of the witnesses will be made. This is done in order to show this Court the complete lack of corroborative evidence (whether properly admissible or not) from which the verdict of guilty could be sustained as a matter of law.

Testimony of the witnesses.

Charles St. John (R. 49-54) testified as follows:

He was foreman of the Grand Jury before which appellant testified under oath at a time when the allegedly perjurious testimony was given by appellant (R. 49-54). The testimony of this witness in no way corroborates the direct testimony of the government's principal witness, Irving Baskin, and will not, therefore, be set forth in detail.

Following the testimony of the witness St. John, the plaintiff read into evidence from page 3, line 5, to page 8, line 20, of Exhibit No. 1, the Transcript of the Grand Jury Proceedings of May 6, 1953 (R. 65-75).

Irving Baskin testified as follows (R. 77-99).

Direct: He had known appellant from about 1941 or 1942 (R. 77). He had known Tiny Heller, a betting commissioner, who died in January, 1952, for about 17 years (R. 78). He was employed by Tiny Heller in 1946 and 1947 on a part-time basis and most of the work was done

during the lunch hour. He took care of Mr. Heller's records for his legitimate business and also did his banking for him (R. 79, 80). The betting commissioner's office was in the back of the liquor store (R. 80). He was present in Mr. Heller's office practically every day. His accounting activities for Mr. Heller consisted of keeping records for the bar, the liquor store and the hotel. He prepared Mr. Heller's tax returns (R. 81). He had occasion to examine the betting commission records. He is familiar with the type of work that Mr. Heller kept in his betting commission business. He saw Exhibit No. 2 before. It is a running account of the bets that were made during the day and he saw Mr. Heller make entries in it (R. 82). He recognizes the handwriting in Exhibit No. 3 as that of Mr. Heller and he has seen Mr. Heller with books of that type (R. 84). He had seen Mr. Heller write checks in the book constituting Exhibit No. 4 and the handwriting therein is that of Mr. Heller (R. 84). The handwriting in Exhibit No. 5 is that of Mr. Heller and he had seen Mr. Heller write checks in that book (R. 85). The three checks exhibited to him and marked Exhibits No. 6, 7 and 8 are in the handwriting of Mr. Heller (R. 86). Two blue sheets marked Exhibit No. 9 are in the handwriting of Mr. Heller (R. 87). He went to the bank for Mr. Heller practically every day during the lunch hour. This banking was done at the Bank of America on 12th and Broadway (R. 87). Mr. Heller's operations ceased at the very end of 1947. He saw the defendant, James Arena at Heller's place of business. During the end he saw Mr. Arena there quite frequently, three or four times a week (R. 88). He saw Mr. Arena there during the lunch

hour. He had dealings with Mr. Arena for Mr. Heller a couple—or a few times. Sometimes Mr. Heller would tell him to go to Mr. Arena's liquor store and give him an envelope and he would take the envelope to Mr. Arena. These envelopes were sealed. That occurred about two or three times during the summer of 1947 (R. 89). He had occasion to cash checks for Mr. Heller. The cashing of checks for Mr. Heller occurred quite regularly. Mr. Heller carried large sums of money with him. The checks he cashed for Mr. Heller could be payable to him or could be his own checks (R. 90). Early in December, 1947, he had a transaction concerning a large sum of money in connection with the defendant Arena. On the day this transaction occurred he first saw Mr. Arena in the liquor store and present were Mr. Arena, Mr. Heller and the boy Stanley Duarte. Stanley Duarte is no longer living. There was a conversation between him and Mr. Heller in Mr. Arena's presence. Mr. Heller said to him, "Take these checks," a group of checks, "get them cashed into one thousand dollar bills and then give them to Jimmy" (R. 91). Prior to this statement Mr. Heller had these checks in his hand and he added them up on a piece of paper, wrote down the amounts, and then wrote his own personal check for the balance and handed the witness those checks and told him to cash them. The total amount of the checks was exactly $38,000.00; the conversation and the handing of the checks to the witness was in the presence of Mr. Arena (R. 92). Immediately after that the following occurred:

> "A. Well, Jimmie and I both left Tiny Heller's Liquor store, went to the Bank of America, just about two blocks away from there.

Q. When you say Jimmy, sir, you mean——

A. Mr. Arena.

Q. Mr. Arena.

A. And then we went to the tellers at the very far end of the bank, because that was the only teller that would handle bills of that denomination.

Q. Now, do you know the name of that teller, sir?

A. It was Herman Worth.

Q. Now, the bank that you went to was what bank?

A. Bank of America, 12th and Broadway, main branch.

* * * * * * *

Q. You went into the bank and you say you went to the window of Mr. Worth? A. That is right.

Q. Mr. Arena with you?

A. He was with me, but he stayed on the side.

Q. Was he within a distance where he could overhear what you were saying? A. He could have.

Q. But you don't know whether he did or not, he wasn't close? A. No, sir.

Q. So that he must have overheard? A. No, sir.

Q. What did you do with the checks at that time?

A. I gave them to Mr. Worth. Mr. Worth took them to the Chief Clerk to get them okayed.

Q. Do you know the name of the Chief Clerk?

A. Well, the fellow who okayed it was, his name was Madeiras.

Q. Madeiras? A. Yes, sir.

Q. What occurred after that, what did Mr. Worth do?

A. Mr. Worth came back to his cage and he got all the thousand dollar bills he had, there wasn't enough bills, so he asked Mr. Seale for his thousand dollar bills. Between the both they scraped up 38 one thousand dollar bills.

Q. What occurred after that?

A. I told Mr. Worth I didn't want him to hand money through the window,——

Mr. Zirpoli. I am sorry.

A. (continuing). ——I told Mr. Worth I did not want them to hand the money through the window because it was such a large sum, that I would meet him back of the Chief Clerk's office in the back of the bank to collect the money.

Mr. Zirpoli. It would be hearsay in the absence of——

The Court. Was James Arena in your company at that time?

The Witness. He was with me in the bank, yes, sir, on the side.

The Court. How close was he to you when this conversation went on?

The Witness. A. I imagine six to eight feet.

Mr. Schnacke. Q. He wasn't part of the group?

A. No, sir, he wasn't at the window.

Mr. Schnacke. I will stipulate it may be stricken.

The Witness. He wasn't at the——

The Court. The answer may go out, ladies and gentlemen of the jury, and you are instructed to disregard it.

Mr. Schnacke. Q. And what did you and Mr. Arena and Mr. Worth do thereafter?

A. We went to the back of the bank.

Q. And is that to a place in the public part of the bank or——

A. It is in the public part of the bank. There is a large, like a desk where they could transact business.

Q. Was it behind the counter?

A. Yes, that is the word I was trying to think of.

Q. You went inside through the counter——

A. We both stayed on the other side.

Q. I see, Mr. Worth was behind——

A. Mr. Worth was behind the counter.

Q. I see. What occurred at that counter?

A. I told Mr. Worth to count the money out in stacks of ten, with eight being the last one. I wanted to make sure all the money was there. And Mr. Worth counted the money out in stacks, three stacks of ten each and one of eight. Then I called Mr. Arena over and I counted the money over to him. He took the money, put it in his pocket.

Q. Do you know what pocket he put it in?

A. I don't recall.

Q. What did you do then?

A. We both walked out of the bank and we walked towards 14th and Broadway." (T. 93-96.)

He left Mr. Arena at the corner of 14th and Broadway around 12:30.

Cross-Examination: It was between 12:00 and 1:00 that he went to the bank. He was not the custodian of Mr. Heller's books. He never wrote the checks constituting the government's exhibits. He did not prepare Government's Exhibit No. 2 and had nothing to do with its preparation (R. 97). He did not prepare Government's ment's Exhibit No. 3 and had nothing to do with those papers. He had not written any of the exhibits shown to him. He physically turned over Government's Exhibit No. 2 to the Internal Revenue when it asked for Mr. Heller's records. All of Mr. Heller's records were put in a box to be turned over (R. 98).

Redirect Examination: He went from 12th and Broadway toward 14th and Broadway because he was going

down to Jimmy Murray's liquor store, where he stopped off sometimes before he went back to work (R. 99).

F. W. Whitted testified as follows (R. 99-132):

Direct: He was employed by Tiny Heller from 1941 to October, 1947, for the purpose of "making the prices" on baseball games during the Coast League baseball season. He had no association or connection with Heller after October of 1947. He saw Mr. Arena in Heller's place most every day, five or six times a week (R. 102). Mr. Arena placed bets with Mr. Heller, starting in 1941, in small amounts, twenty, thirty, forty, fifty dollars (R. 105). In 1946 and 1947 the bets ran larger, $100 to two or three thousand, sometimes on single events, sometimes in groups. Mr. Arena placed a thousand, two thousand on several single events (R. 106). He recorded transactions on behalf of Mr. Heller. When he recorded bets from Mr. Arena he wrote it on football parlays. Government's Exhibit No. 10 bears his handwriting and reflects bets placed by Mr. Arena in October, 1947. The initials "J.A." appearing on these exhibits were used by him to refer to James Arena (R. 109). These cards constituting Exhibit No. 10 were admitted for the purpose of showing size and character of these bets at that particular time and for no other purpose. The witness then explained the system of parlay betting as reflected by Exhibit No. 10 and the amounts won or lost on five bets recorded therein (R. 109-111). The initials "J.A." on Exhibit No. 9 and the figures reflecting the amounts won or lost on bets recorded therein were written by him. The other writing contained in Exhibit No. 9 is Mr.

Heller's writing (R. 114). He cannot tell from the exhibits and he does not know when the handwriting on Exhibit No. 9 was placed there (R. 115). These exhibits were offered only to show the fact that the characterization of Mr. Arena in the records was sometimes "J.A." and sometimes "Jimmy A." Mr. Heller's handwriting appears in Exhibit No. 2. He saw Mr. Heller make entries in it. He saw Mr. Heller work in books like Exhibit No. 3, the handwriting is that of Mr. Heller and this exhibit reflects single bets on different games (R. 119, 120). He recorded bets in the name of Arthur Samish. At one time Mr. Samish placed bets himself and at a later time Mr. Arena placed bets for Arthur Samish (R. 120, 121). When these bets were placed earlier there was a designation "AS" for the bettor and later there was a designation "SA". In 1941 and 1942 Mr. Samish placed the bets himself and the later period he referred to was 1946, '46 and '47 (R. 122). He had been present when he heard appellant place telephone calls from Mr. Heller's betting establishment. He had heard appellant ask for "the Colonel" on many occasions (R. 124). He knows Arthur Samish to be a person using the designation of "the Colonel" (R. 124).

The Court in permitting this testimony, said:

> "This testimony which is now being admitted, ladies and gentlemen, is not contained in the language of the indictment. It is merely admitted, and you are allowed to consider it for the purpose of showing any motivation or any purpose that Mr. Arena may have had, and in aiding you in subsequently determining whether or not he has perjured himself.

These are merely circumstances which you may take into consideration. He is not charged with these specific things which are now being admitted in evidence against him." (R. 124.)

Exhibit No. 10 reflects a winning of $7900.00. In the earlier years he made payments to Mr. Samish on the amounts he won. In the years 1945 and thereafter he made no settlements with Mr. Samish. The settlements were made to Mr. Arena (R. 125). Sometimes he was present when such settlements were made. These settlements were made in Mr. Heller's office in cash (R. 125, 126). He was acquainted with Mr. Baskin and then speaking of Mr. Baskin he testified:

"Q. And did he ever participate, as far as you know, in any settlement?

A. Well, he used to go and get the cash at the bank, is all.

Q. And did he ever deliver any cash so far as you know?

A. Delivered it to Tiny, he delivered it to Mr. Heller's office." (R. 126.)

Cross-Examination: A small bettor using the cards as contained in Exhibit No. 10 usually circled the teams that he is betting on and puts his name on the bottom of the card. This is not the usual practice for big bettors (R. 127). Everything on the card is in the witness' handwriting (R. 127). He personally paid appellant money on one occasion only. He can't remember the date. The amount was several hundred dollars. He doesn't remember exactly. It wasn't as much as $1,000.00 (R. 128). He saw payments being made to appellant most

every Monday at Heller's office. He cannot recall the amounts (R. 129). He can't say whether he had ever seen Exhibit No. 3 before (R. 129). He made none of the entries contained in Exhibit No. 2. He has no recollection of the conversations at the time the bets reflected in Exhibit No. 10 were made. He does not consider the bets reflected by this last exhibit as being heavy. The bet reflected in this exhibit was being made by Arena on behalf of Mr. Samish and was carried under "J.A." (R. 131).

Redirect: He observed, on many occasions, payments being made to appellant in amounts of "several thousand dollars, six, seven thousand, ten thousand; big amounts." Settlements were customarily made on Monday or Tuesday (R. 131).

Recross: He never handled the cash. He saw Mr. Heller giving cash to Mr. Arena, that is all. He can't pick out any specific dates or specific amounts. There were too many people coming in and going out (R. 132).

Rosalind Heller testified as follows (R. 132-157):

Direct: She is the widow of Zola Heller, usually known as Tiny Heller, who died January 23, 1952. During 1946, '46 and '47 she was living with Mr. Heller. In 1946 and 1947 Mr. Heller operated as a betting commissioner with his office in the rear of the liquor store. He also conducted his betting activities at home (R. 133). She recorded bets for him on occasions. She knows what kind of records he kept and she knows his handwriting. Exhibit No. 2 is his book. She observed him making entries in that book (R. 134) on many occasions. That book is a

record of his accounts. Exhibit No. 3 is a record of a type maintained by Mr. Heller (R. 135). She has seen him prepare records of that sort. It is in Mr. Heller's handwriting (R. 135). In admitting Exhibit No. 3 in evidence the Court said,

> "It will be admitted for the limited purpose of being an exemplar of certain business records kept by Mr. Heller, and having been further identified for that purpose only." (R. 136.)

Exhibits 4 and 5 are business records of Mr. Heller. These were admitted in evidence subject to the same limitation quoted above (R. 134). Exhibits 6, 7 and 8 are in Mr. Heller's handwriting. On occasion she recorded bets for Mr. Heller. She recorded a bet placed by James Arena (R. 139). She did not record them in Mr. Heller's book. She noted them on a separate piece of paper if it was necessary (R. 139). She only wrote one bet for Mr. Arena. She never used symbols to designate the bettor. She did not have to. She only did it occasionally, when Mr. Heller was ill or something. The initials "S.A." were used for "Artie Samish". Referring to check stub 1264 the "S.A." means "Artie Samish Account to James Arena" (R. 142). It is in her husband's handwriting and the check was for the amount of $6,150. Exhibit No. 3 says it's for the "week ending 11/30/47". The first three pages of that document represent wagers for Samish. It reflects that he won $34,800 (R. 143). An objection was interposed as to all of this testimony as hearsay. Check No. 1670 dated December 3, 1947, under "remarks", where it says "S.A." and the "A.C.T." means "Artie Samish

Account'' and the amount of the check is $6,050 (R. 143). The figure $38,400 shown on the third page of Exhibit No. 3 is a summary of all preceding pages (R. 146). Exhibit No. 2-1 contains a group of entries made on October 26, 1946. There are three bets involved in the ''S.A.'' bet. The entries reflect a win of $4,050.00 (R. 149). Exhibit No. 2-2 reflects seven bets. The initials ''S.A.'' refer to Arthur Samish. It reflects a win of $6,150. The names of the teams contained in Exhibit No. 2 for the period October, 1946,—Cards, Buffalo, Yanks, Forty-Niners, Boston, Phillies and Yanks were Eastern baseball (R. 152). Forty-Niners is a football game and Phillies was a baseball game. Yank was baseball (R. 152). Mr. Arena was frequently at her home and he transacted business with her husband there. In connection with that business Mr. Arena made telephone calls. When Mr. Arena picked up the receiver he would give a number. He would ask for Mr. Samish. That happened several times (R. 154).

Cross-Examination: She did not personally keep the account book, Exhibit No. 2. She did not personally make any of the entries (R. 155) in this book. She does not know whether she personally handled any of the transactions reflected by Exhibit No. 2-2. She does not know what the initials ''L.L.'' are. It is the name of a bettor, she does not know whose (R. 155). She does not know the initials ''P.N.'' She knows what the name ''Omaha'' means. She does not know what the name ''J.J.'' represents. She wasn't familiar with all of Mr. Heller's accounts. She did not personally prepare any part of Ex-

hibit No. 3. She did not personally participate in any part of the transactions represented there (R. 156). She personally had nothing to do with Exhibits No. 4 and 7, nor with the check stubs marked 1253 and 1264. She did not personally have anything to do with Exhibit No. 5 nor with the check stub marked 1670 (R. 157). She personally did not have anything to do with the payment or settlement or transaction covered by Check No. 1670 (R. 157).

Earl Madeiros testified as follows (R. 158-159):

Direct: He is employed by the Bank of America, Twelfth and Broadway Branch. In December, 1947, he was an Assistant Chief Clerk. He has an independent recollection of a transaction involving some $38,000 and a man by the name of Tiny Heller which occurred in December, 1947 (R. 158). The transaction, as he recalls it, was as follows:

> "Q. And would you tell us what your recollection is of that transaction?
>
> A. Well, to—it is my recollection that in December of 1947, which was possibly two months after I had gone under this new job, we were presented with a check totalling $38,000 by our paying teller. He wanted those to be approved for cashing. I had been on the job, as I say, approximately two months and wasn't entirely familiar with all the procedures on Tiny Heller's operation, so I referred them to the senior officers at the bank at the time and he gave me the nod that the checks were in order, so therefore I in turn approved them and handed them back to the paying teller to disburse the money." (R. 159)

He indicated his approval by his initials. There were four checks involved. The paying teller was Herman Wirth. He has seen the photostats of the four checks shown him before. These are Recordak copies. He has the film from which they were made. The film represents December 4, 1947. These checks appear on the film one right after the other. These checks contain his signature. The total amount of these checks is $38,000. They are the checks that were presented to him for approval. The checks were received in evidence as Exhibit No. 11 (R. 161). The rubber stamp on the face of the checks bearing the number 111 show that cash was paid for the checks. The stamp 10-C on each of these checks refers to the teller Herman Wirth (R. 162). The teller maintains a daily record of the amount paid out on all cash checks; the listing for the teller Mr. Wirth for the date of December 3, 1947 is still in existence. He produced it. It bears the stamp 10-C. The stamp indicates it was Mr. Wirth's (R. 162). The checks are reflected in the listing, being the first four checks in the lefthand column. They total $38,000. The pencil writing at the lefthand column appears to be that of Mr. Wirth. The name Madeiros, as an officer's name, appears opposite the amount of the check. This listing is called a teller's pay proof. It was introduced in evidence as Exhibit No. 12. Exhibit No. 8 in the amount of $6,050 bears his initials in the upper lefthand corner. That is one of the checks received on this occasion. The endorsement appearing on the reverse side of this check is that of Irving Baskin. He is familiar with the signature of Irving Baskin (R. 164).

Cross Examination: Among the duties and responsibilities of the Assistant Chief Clerk is the approval of drafts for payment. These four checks were presented for his approval and payment and in conformity with the practice which is followed for the approval of checks for payment, he wrote his name and initials on the face of the checks, after conferring with another officer; then he testified as follows:

> "Q. And the only knowledge that you have of this transaction is the fact that Mr. Wirth presented these checks to you and that you conferred with the senior officer and you approved the payment of the checks, isn't that correct? A. That is right.
>
> Q. And that is the only recollections you have of the entire transaction, isn't that correct?
>
> A. That's right." (R. 166)

Thereafter the prosecution read into evidence page 18, lines 6 to 24 and page 19, lines 6 to 11 from the transcript of the testimony of Mr. Arena before the Grand Jury (R. 168-169). This testimony related to purported bets made by appellant with Mr. Whitted in 1946 and had no relation to the transaction in December of 1947, upon which the indictment was predicated. Excerpts from the testimony of Mr. Arena before the Grand Jury were received in evidence and marked Exhibit No. 15 (R. 171).

Other evidence was offered with relation to the second count of the indictment; however, a judgment of acquittal was granted as to this count and there is, therefore, no need to summarize this evidence.

Thereafter the prosecution rested its case.

Appellant did not take the witness stand and no evidence was offered in his behalf.

Thereafter the defense rested (R. 179).

Following arguments of counsel, the Court below instructed the jury (R. 222-237) and it returned a verdict of guilty (R. 28). The instructions to which appellant takes exception will be separately discussed hereinafter. The judgment and sentence of the Court has hereinbefore been stated.

SPECIFICATIONS OF ERROR.

1. *The Court Below Erred in Denying Appellant's Motion to Dismiss the First Count of the Indictment.*
   Points on Appeal I, II, III, V, VI (R. 243-244).

2. *The Court Below Erred in Denying Appellant's Motions for Judgment of Acquittal on the First Count of the Indictment.*
   Points on Appeal VII, VIII, IX, X, XI, XII (R. 244-245).

3. *The Evidence Was Insufficient as a Matter of Law to Sustain the Verdict of the Jury.*
   Points on Appeal X, XI, XII (R. 244-245).

4. *The testimony of the Witness Irving Baskin Was Without Independent Corroborative Evidence and Therefore Insufficient as a Matter of Law to Sustain the Verdict of the Jury.*
   Point on Appeal XII (R. 245).

5. *The Court Below Erred in Admitting in Evidence the Testimony of the Witness F. W. Whitted Over Objection of Appellant.*
Points on Appeal XIII, XV (R. 246).

The full substance of the evidence complained of under this specification is that the witness Whitted was permitted to testify as to transactions and conversations with appellant completely unrelated in time or event to the transactions involved in the alleged perjurious statement of appellant and he was permitted to testify as to the meaning of transactions and entries in exhibits in which he did not participate and of which he had no personal knowledge. Repeated objections to this evidence were made by counsel for appellant (R. 101, 103, 104, 105, 106, 107, 108, 114, 115, 117, 118, 119, 120, 121) and a motion to strike the same (R. 171-172) was denied by the Court below (R. 176).

6. *The Court Below Erred in Admitting in Evidence the Testimony of the Witness Rosalind Heller Over Objection of Appellant.*
Points on Appeal XIV, XV (R. 245).

The full substance of the evidence complained of under this specification is that the witness Rosalind Heller was permitted to testify as to transactions and conversations with appellant completely unrelated in time or event to the transaction involved in the alleged perjurious statement of appellant and she was permitted to testify as to the meaning of transactions and entries in exhibits in which she did not participate and of which she had no

personal knowledge. Repeated objections to this evidence were made by counsel for appellant (R. 136, 137, 138, 140, 141, 142, 143, 145, 146, 148, 149, 150, 152, 153) and a motion to strike the same (R. 172) was denied by the Court below (R. 176).

7. *The Court Below Erred in Admitting in Evidence Each of the Following Government Exhibits: Nos. 2, 3, 4, 6, 7, 9, 10, 15.*
Points on Appeal XVI, XVII (R. 245).

These exhibits, individually and collectively, are completely unrelated in time or event to the transaction involved in the alleged perjurious statement of appellant and were admitted in evidence subject to limitations which were thereafter not adhered to by either the prosecutor in his argument or by the Court below in its instructions to the jury. Proper objections were made as to each of these exhibits (R. 108 (referring to previous objections, R. 106 and 107), 115, 117, 135, 136, 137, 138) and a motion to strike each of the same (R. 172, 173) was denied by the Court below (R. 176).

8. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 8 in Its Entirety and as Presented.*
Point on Appeal XXI (R. 246).

The requested instruction which the Court below refused to give in its entirety read as follows:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath, and circumstantial

evidence of such falsity, no matter how persuasive, is insufficient." (R. 44)

This requested instruction was submitted as a correct statement of the applicable law. Exception on this ground was taken to the failure of the Court to give this instruction (R. 232).

9. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 10.*
Point on Appeal XXII (R. 246).

"To sustain a conviction of perjury on either count of the indictment, the evidence as to such count must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant. When I speak of corroborative evidence I mean evidence which tends to show the perjury independently." (R. 44, 45)

This was a proper and indispensable instruction since the sufficiency of the evidence to sustain a verdict of guilty of perjury on the testimony of a single direct witness requires corroboration thereof by other evidence which tends to show the perjury independently.

10. *The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 11.*
Point on Appeal XXIII (R. 246).

"Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead

directly to the inevitable—not merely probable—conclusion of falsity. The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof." (R. 45)

This was a proper and indispensable instruction since evidence which merely establishes a probable conclusion of falsity will not sustain a verdict of guilty of perjury.

Exception to the failure to give this instruction was taken and authority in support of appellant's request was cited (R. 233).

11. The Court Below Erred in Refusing to Give Appellant's Requested Instruction No. 12.

Point on Appeal XXIV (R. 246).

"I have heretofore received in evidence acts and declarations and exhibits relating to transactions of the defendant other than those covered by the statements alleged in the indictment to have been made under oath by the defendant, and at that time I instructed you that such evidence was received for the sole purpose of throwing light upon the intent or motive of the defendant or to show prior design or plan of the defendant, and not for the purpose of showing the falsity of the specific statements attributed to him in the two counts of the indictment. Nothing I said during the trial and nothing I state in these instructions is to be construed by you to permit the consideration of such evidence for any other purpose." (R. 45, 46)

Much of the evidence was unrelated in time or event to the transaction involved in the perjury charge against the accused. He was, therefore, entitled to have the foregoing instruction fully and correctly given to the jury.

12. *The Court Below Erred in Giving the Following Instruction to the Jury.*
Point on Appeal XXV (R. 247).

> "By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy."

This instruction created the erroneous impression in the minds of the jurors that *any* corroboration of the testimony of the direct witness, such as a bank record, would suffice without clearly indicating that such corroboration must be of the falsity of the alleged perjurious statement of the accused. It permits a conviction on corroboration of collateral matters testified to by the direct witness.

Exception to the instruction on the foregoing grounds was taken (R. 233, 234).

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE FIRST COUNT OF THE INDICTMENT.

The first count of the indictment charges two or more offenses in one count.

It is fundamental that two separate offenses may not be included in one count of an indictment.

Federal Rules of Criminal Procedure, Rule 8 (a);
United States v. Martinez-Gonzales, D.C. Cal., 1950, 89 F.S. 62;
United States v. Dembowski, D.C. Mich., 1918, 252 F. 894, 897.

The test in determining whether more than one offense is charged in an indictment (or count thereof) is whether or not each offense requires proof of some fact which the others do not.

Dimenza v. Johnston, 9 Cir., 130 F. 2d 465, 466;
Carpenter v. Hudspeth, 10 Cir., 112 F. 2d 126, 127.

It must be kept in mind that at the time of appellant's appearance before the Grand Jury, it was interested not only in the financial affairs of Arthur Samish and Frank X. Flynn, but also in the affairs and transactions of anyone who might have violated the income tax laws of the United States including appellant (R. 52).

A review of the allegations of the first count of the indictment which has been quoted in full at pages 4 to 6 hereof clearly shows that five separate offenses were charged in one count. They are:

One

Q. I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollar bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollar bills to you and give you the bills. A. I didn't get them, sir.

Q. Did that happen? A. No, sir.

Q. Anything like it? A. No, sir.

Two

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Three

Q. Has Mr. Baskin ever delivered any money to you? A. No, sir.

Q. Even one cent? A. Never had occasion to.

Four

Q. Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else? A. That's correct, Mr. Burke.

Five

Q. (By the Foreman) Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir. (R. 4-5)

Section 1621, Title 18 U.S.C., provides in part as follows:

> "Whoever, having taken an oath * * *, wilfully and contrary to such oath states * * * *any material matter* which he does not believe to be true, is guilty of perjury * * *" (Italics supplied).

Under this statute a witness commits the crime of perjury *each time* he states *any* material matter which he does not believe to be true. This principle was clearly stated in *United States v. Cason,* D.C. La., 39 F.S. 731, 734, wherein the Court said,

> "The defendant, as a witness before the Grand Jury, was bound to tell the truth, and each time he wilfully and corruptly swore falsely as to any distinct, separate and material matter under investigation, of which a Federal Court had jurisdiction, it constituted a separate offense of perjury."

We proceed then to examine the five separate matters set forth in the first count.

Proof of the falsity of number two above does not necessarily require proof of facts essential to the proof of the falsity of any one of one, three, four or five above.

Thus, if it were established that the defendant went to the bank with Mr. Baskin (two above) it would not necessarily prove that he received any money from Mr. Baskin (three above) and particularly it would not necessarily prove that he received 38 $1,000 bills from Mr. Baskin (one above) and, conversely, proof that appellant had received $38,000 from Mr. Baskin would in no way prove that appellant had gone to the bank with him. Similarly, proof of the falsity of No. Four above does not

necessarily require proof of facts essential to the proof of any one of One, Two, Three or Five above and proof of the falsity of Five above does not necessarily require proof of facts essential to the proof of any one of One, Two, Three or Four above.

Clearly, this indictment presents a situation wherein two or more offenses are alleged in one count. Each of the five matters of inquiry were material to the broad investigation then being conducted by the Grand Jury, yet each was directed to a distinct and separate matter within the knowledge of appellant.

The Circuit Court of Appeals for the Eighth Circuit, in *Seymour v. United States,* 77 Fed. 2d 577, dealt with the reverse situation. In that case appellant was sworn and testified before a Senate Committee investigating campaign expenditures in connection with the election of a United States Senator. The answers given by appellant in the course of his testimony became the basis of eight counts of an indictment, each of which charged him with perjury. After conviction on five counts, appellant took an appeal in which he contended that but one crime was charged in the several counts and that all the questions and answers assigned as perjury should have been put into one count. The Court refuted this contention in the following language at page 181:

> "* * * Neither the circumstances that all referred to the *same general subject of inquiry* or that all were made *at the same hearing* prevents each from being a separate and distinct crime punishable as such. The commission of perjury as to one matter does not absolve the witness or afford him immunity as to all

other matters covered by his testimony at the same hearing. The obligation to testify truly and the penalty for false swearing is present as to every material answer given by him. While there is a sound discretion as to such matters in the trial court (Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; Morris v. United States, 161 F. 672 (C.C.A. 8)), it would seem there would have been more ground for attacking the indictment as duplicitous had all of these matters been joined in one count than there is to attack the statement in separate counts." (Italics supplied.)

See also:

United States v. Orman, 3 Cir., 207 F.2d 148, 160;
United States v. Emspack, D.C., D.C., 95 F.S. 1012, 1016.

We, therefore, respectfully submit that the first count of the indictment is duplicitous and that the Court below should have granted the motion to dismiss this count of the indictment (R. 12-15). For the same reasons the Court below should have granted the motion in arrest of judgment (R. 31). Both motions were timely made and strenuously urged.

SPECIFICATIONS OF ERROR NOS. 2, 3, AND 4.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE FIRST COUNT OF THE INDICTMENT. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF THE JURY. THE TESTIMONY OF THE WITNESS BASKIN WAS WITHOUT INDEPENDENT CORROBORATIVE EVIDENCE AND, THEREFORE, INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF THE JURY.

These specifications of error relate to the sufficiency of the evidence to sustain the verdict of the jury and arise from the denial of each of:

(a) appellant's motion for judgment of acquittal at the close of the government's case in chief (R. 176);

(b) appellant's motion for judgment of acquittal at the close of the entire evidence (R. 179); and

(c) appellant's motion for judgment of acquittal notwithstanding the verdict of the jury (R. 32, 238).

The statement of the accused alleged to have been perjurous (assuming but one offense is alleged in the first count of the indictment) was summarized by the prosecution as follows:

> "The first count alleges in substance that the defendant falsely swore that he had not received $38,000 from Mr. Baskin at a bank in Oakland." (Government's Memorandum in Opposition to Motion to Dismiss the Indictment.)

That the foregoing constitutes the basis of the first count of the indictment was further indicated by the Court below when it limited the testimony of the witness Whitted by saying:

> "This testimony which is now being admitted, ladies and gentlemen, is not contained in the language of the indictment. It is merely admitted, and you are allowed to consider it for the purpose of showing any motivation or any purpose that Mr. Arena may have had, and in aiding you in subsequently determining whether or not he has perjured himself. These are merely circumstances which you may take into consideration. He is not charged with these specific things which are now being admitted in evidence against him." (R. 124.)

Any other position by the government now would destroy its contention that the first count of the indictment is not duplicitous.

In prosecutions for perjury, the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant. *United States v. Neff,* 3 Cir., 212 F. 2d 297, 306.

The *only* direct evidence offered by the government to show the alleged falsity of appellant's statements, if believed, was the testimony of Irving Baskin that early in December, 1947, he went to a branch of the Bank of America in Oakland accompanied by appellant and there cashed four checks for which he received thirty-eight one thousand dollar bills from the teller, Herman Wirth, which he then and there counted out and turned over to appellant (R. 92-96 and quoted in pages 10 to 13 of this brief).

Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence,

the latter must be inconsistent with the innocence of the defendant, i.e., the independent evidence must be corroborative of the fact that the accused swore falsely. *United States v. Neff,* supra; *United States v. Palese,* 133 F. 2d 600, 603; *United States v. Seavey,* 180 F. 2d 837, 839. Therefore, it is this testimony emanating from Irving Baskin as to his delivery of $38,000 to appellant for which there must be independent corroborative evidence. Corroboration of collateral matters testified to by the witness can never suffice.

F. W. Whitted, assuming but not for a moment conceding that his testimony was properly admitted in evidence, testified as to the association between appellant and Tiny Heller from 1941 through October of 1947. The testimony of Irving Baskin is that the transaction here involved occurred in early December, 1947. Mr. Whitted had no knowledge of any transactions between appellant and Mr. Heller after October or early November, 1947. *HE HAD NO KNOWLEDGE OF WHAT OCCURRED IN DECEMBER OF 1947.* He further testified that he had observed settlements of the Samish bets being made with appellant at Mr. Heller's office and that such settlements were always made in cash. He further testified as follows:

> "Q. And you are acquainted with Mr. Baskin?
>
> A. Yes, sir.
>
> Q. And do you know what his activities were at Mr. Heller's establishment? A. He was the auditor.
>
> Q. And did he ever participate, as far as you know, in any settlement?
>
> A. We * * *, he used to go and get the cash at the bank, is all.

Q. And did he ever deliver any cash so far as you know?

A. Delivered it to Tiny, he delivered it to Mr. Heller's office." (R. 126.)

This testimony, rather than substantiating the direct testimony, contradicts the likelihood that Mr. Baskin participated in the settlement of Mr. Heller's accounts. There is not one word of the testimony coming from F. W. Whitted that is inconsistent with the innocence of appellant and corroborative of Irving Baskin's testimony that he delivered $38,000 in cash to appellant at the bank in Oakland. Furthermore, F. W. Whitted was not employed by Tiny Heller in December, 1947, and did not and could not testify as to any transactions concerning Heller's betting commissions at that time. His testimony alone could not possibly corroborate the witness Baskin, nor could this testimony correlated with other evidence do so.

In considering Rosalind Heller's testimony, we will momentarily assume, but not for a moment concede, that her testimony was properly admitted in evidence. Her testimony was to the effect that bets were made for Arthur Samish and that for the week ending November 30, 1947, there was a net win of $34,800.00 on these bets as recorded in Exhibit No. 3. This latter testimony was purely hearsay, called for the opinion of the witness and was clearly inadmissible as will be made abundantly clear in the argument on Specification of Error No. 6. Mrs. Heller did not testify that appellant placed these bets. In fact, she had nothing to do with the transactions reflected in this exhibit, did not make the entries therein and had

no personal knowledge thereof. She did testify (over proper objection as hearsay) that Check Stub 1264, Exhibit No. 4, which bears the date October 30, *1946* and the initials "SA" means "Artie Samish Account to James Arena" (R. 142). Yet she had nothing to do with the preparation of that check (R. 156). Check No. 1264 had been endorsed "I. Baskin" and cash was paid for it by the bank according to the testimony of Earl Madeiros (R. 161, 162). Considered in the light most favorable to the government, this hearsay testimony of Mrs. Heller and the exhibits which bear upon it, tends to prove that Irving Baskin presented this check at the bank and that cash was paid for it and that it was, according to the check stub, for "Artie Samish Account to James Arena". Thus, there is absolutely no testimony from which we may infer that appellant accompanied Mr. Baskin to the Bank on December 3, *1947,* and there received $38,000 from him. Is not this evidence as consistent with the proven fact that Mr. Baskin delivered the cash to Mr. Heller's office as was his general practice?

Unfortunately, Mr. Heller was deceased at the time of the trial and thus the government and appellant alike were deprived of direct and positive evidence as to the circumstances attending the receipt and disbursement of the $38,000 cash received by Baskin on December 3, 1947. This circumstance does not militate against the well-established rule that the evidence must be strong, clear, convincing and direct, and that the corroborative evidence must tend to show the perjury independently. *United States v. Neff,* supra, 307.

The testimony of Earl Madeiros, Assistant Chief Clerk of the Twelfth and Broadway Branch of the Bank of America in December of 1947, when considered in the light most favorable to the prosecution will establish that on December 3, 1947, four checks totalling $38,000 drawn on the Zola Heller account were presented to him by a teller, Herman Worth, for approval for payment in cash, that he indicated his approval by placing his signature on the face of the checks (R. 159; Exhibit No. 11) and that cash was paid for these checks (R. 161, 162; Exhibit No. 12). One of these four checks in Exhibit No. 11, Check No. 1670, which is also Exhibit No. 8, bears the endorsement "I. Baskin". From this we might infer that Mr. Baskin presented the checks and received $38,000 in cash. This is merely corroboration of the receipt of money on the part of Baskin and is not corroboration of his direct testimony that he accompanied appellant to the bank and there turned over 38 one thousand dollar bills to appellant. Where is there any proof that appellant accompanied Irving Baskin to the bank? Where is there any proof that Irving Baskin paid $38,000 to appellant? Where is there any proof inconsistent with the fact that Irving Baskin did not deliver the $38,000 cash to Mr. Heller's office as was his usual practice? We respectfully submit that there is a complete absence of corroborative facts or circumstances arising from the testimony of Earl Madeiros or the exhibits which bear upon this testimony of Baskin.

The testimony of Earl Madeiros and the business records of the bank at which he was employed (Exhibits Nos.

11 and 12) were, undoubtedly, relied upon by the prosecution as the keystone of its case; yet, significant in this regard is the government's failure to call Herman Worth as a witness or to offer any testimony in explanation of such failure. It was Herman Worth, teller at the bank in Oakland, to whom the checks totalling $38,000 were presented by Irving Baskin. It was Herman Worth who presented the checks to Earl Madeiros, his superior, for approval in payment in cash. According to Irving Baskin it was Herman Worth who accompanied him and appellant behind the counter at the bank while the money was counted out first to Mr. Baskin and then to appellant. It was Herman Worth, if anyone, who could corroborate Mr. Baskin's testimony clearly and directly; yet, we repeat, he was not called as a witness nor was any reason or explanation given for the failure of the government to call him. For some unexplained reason the government failed to call still another employee of the bank, Mr. Seale, who participated in the cashing of the $38,000 (R. 94). It must be presumed, therefore, that had Herman Worth or Mr. Seale been called, their testimony would have been unfavorable, for as was said in *Ford v. United States,* 5 Cir., 210 F. 2d 313, 317,

> "The ruling even in criminal cases is that if a party has it peculiarly in his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

See also:

Billeci v. United States, 184 Fed. 2d 394, 398;

Dickinson v. United States, 9 Cir., 203 F. 2d 336, 344;

Matson Navigation Co. v. United Engineering Works, 9 Cir., 213 F. 293, 305.

No corroboration coming from the witnesses, we must now examine the exhibits admitted in evidence to see if they will independently corroborate Baskin's testimony that he went to the bank in Oakland accompanied by appellant and there obtained $38,000 in cash which he delivered to appellant. Exhibit No. 3 cannot be considered, for the Court, in admitting it into evidence, said,

> "The Court. It will be admitted for the limited purpose being an exemplar of certain business records which kept by Mr. Heller, and having been further identified for that purpose only." (R. 136.)

Since it is admitted as an exemplar only, its contents cannot be deemed evidence; however, assuming, without for a moment conceding, that its contents are evidence, we have what purports to be a weekly record of betting activities which was kept by Tiny Heller. It was described by the witness, Rosalind Heller (in violation of the hearsay evidence rule and over objection) as being for the week ending November 30, 1947 (R. 142). Over further objection of counsel for appellant the witness Rosalind Heller, was permitted to further interpret this exhibit. Giving this exhibit and testimony of Mrs. Heller interpreting the same every inference favorable to the prosecution, it may tend to prove that appellant placed bets ending the week of November 30, 1947, for the account of Mr. Samish which resulted in a net win of $34,800. This evidence does not

shed a spark of light upon the question most vital to the government's case. It does not constitute independent corroboration that Irving Baskin, early in December, 1947, went to a bank in Oakland accompanied by appellant where he obtained $38,000 in cash which he immediately turned over to appellant. This proof leads to the conjectural possibility that sometime after November 30, 1947, a settlement *might* have been made between persons unknown in an amount approximating $34,800, at a place unknown. There is nothing inconsistent with this proof and the fact that Mr. Baskin delivered the $38,000 to Mr. Heller as was his usual practice.

Exhibits 2, 2-1 and 2-2 must be considered in connection with Exhibits 4, 6 and 7. Exhibits 2-1 and 2-2, which record bets made by "S.A." during the month of October *1946,* reflect bets by this bettor resulting in net wins of $4,050 and $6,150. Stub No. 1253 in Exhibit 4 contains notations "W.B. S.A." and "$4,050.00 SAT." Exhibit 6 is Check No. 1253 dated October 28, *1946* in the amount of $11,950, and is endorsed by I. Baskin. Stub No. 1264 in Exhibit 4 contains notations "W.B., S.A. Act. to J.A." and "Amount $6,150.00." Exhibit 7 which is Check No. 1264 is payable to cash in the amount of $6,150, dated October 30, *1946,* and is endorsed by I. Baskin. These exhibits when considered in the light most favorable to the prosecution establish nothing more than that sometime near October 28, *1946* or October 30, *1946* bets were placed on behalf of someone known to Tiny Heller as "SA" which resulted in net wins of $4,050 and $6,150 and that $18,000 may have been

paid out by Tiny Heller, or someone in his behalf, to someone known to Tiny Heller as "J.A." in settlement of these wins plus another amount, the source of which is in no way indicated by the evidence herein. This transaction occurred in October, *1946*. It in no way corroborates Mr. Baskin's testimony that early in December, *1947* he accompanied appellant to the bank in Oakland and there obtained $38,000.00 which he turned over to appellant. It is inconceivable that proof of a transaction occurring in *1946* could be considered corroboration of a transaction which occurred in 1947 as testified to by the only direct witness, Irving Baskin.

Exhibits 5 and 8 must be considered together. Check Stub No. 1670 is dated December 3, 1947 and contains the remark "S.A. Act." Exhibit 8 is check No. 1670 dated December 3, 1947. The exhibit is silent as to how, by whom or to whom this amount was paid. Again this evidence in its most favorable light only proves that on or about December 3, 1947, Mr. Heller or someone on his behalf may have paid $6,050 to someone identified by the check stub as "S.A. Act." at some place. It has not one bit of corroborative value in regard to Mr. Baskin's testimony that early in December, 1947, he accompanied appellant to the bank and there turned over $38,000 to appellant.

Exhibit 9 contains the initials "JA" in Mr. Whitted's handwriting and was identified by him as referring to James Arena (R. 113, 114, 115). A net win of $2,000 is also reflected in Mr. Whitted's handwriting. On the opposite side of the exhibit appears a record of several

bets and the name "Jimmie A." all of which is in Mr. Heller's handwriting (R. 113). The date of this transaction is completely unknown, except that we do know it could not have been after October, 1947 (R. 100). It is in no way connected up with Mr. Baskin's testimony relating to the events of December 3, 1947, and, therefore, could not conceivably be corroborative of the testimony of Mr. Baskin. The most favorable construction that could possibly be given this exhibit is simply that sometime before October, 1947, appellant made a bet that resulted in a net win of $2,000.

Exhibit 10 is a group of five cards, described by Mr. Whitted as parlay cards (R. 108). Each card is dated October 26, *1946*. At the bottom of each card appears the initials "J.A." in the handwriting of Mr. Whitted and used to designate James Arena (R. 109). There is no evidence as to who received the proceeds of this transaction, by whom it was paid, how or where it was paid. Considered in the light most favorable to the prosecution, the most that this exhibit proves is that in October, *1946* appellant placed a series of bets with Mr. Whitted, who was acting on behalf of Tiny Heller, which bets resulted in a net win of $7,900. This transaction could have no conceivable relation to the transaction of December, *1947*, more than a year later, and, therefore, could not in any conceivable way corroborate the direct testimony of Mr. Baskin.

Exhibit 11 is a series of photostatic prints of checks. This exhibit must be considered in connection with Exhibit 12. The checks in Exhibit 11 represent a total of

$38,000. Three of the checks were payable to "T. Heller". There is no evidence as to who endorsed these checks for payment. The fourth photostatic copy is that of the check marked Exhibit 8, which is Check No. 1670. This check is payable to cash and is endorsed by "Zola Heller" and "I. Baskin". The cashing of these checks is reflected in Exhibit 12, which shows that the teller, Herman Worth, paid cash for these items, the amounts of which are listed in consecutive order on Exhibit 12. Check Stub No. 1670 in Exhibit 5 corresponds to the photostatic copy of the check in Exhibit 11, which is in the amount of $6,050.00. This stub bears the notation "S.A. Act.", which was in Mr. Heller's handwriting. The four checks in Exhibit 11 on their face all bear the notation "O.K. E. Madeiros", a rubber stamp marked "10-C", which refers to the teller Herman Worth, and a rubber stamp mark "111", which indicates that cash was paid on each of the four checks. These exhibits construed together at most lead to the inference that on December 3, 1947, they were exchanged for cash by Irving Baskin. They do not show or tend to show what Baskin did with the cash. The government will, undoubtedly, contend that these exhibits should be construed together with Exhibit 3, but Exhibit 3 was admitted in evidence merely as an exemplar of business records kept by Mr. Heller. Nevertheless, assuming Exhibit 3 was in evidence without limitation and for all purposes and construing it together with Exhibits 11 and 12 and 5 and 8 and giving it the most favorable interpretation possible for the government, the most that they prove is:

1. That for the week ending November 30, 1947, bets were placed by someone referred to in Mr. Heller's handwriting as "SA" which bets resulted in a net win of $34,800 (Exhibit 3).

2. That on December 3, 1947, four checks totalling $38,000 were presented by Mr. Baskin to Herman Worth, the teller, at the bank (Exhibits 11 and 12).

3. That Herman Worth presented the four checks to Mr. Madeiros for approval for payment (Exhibits 11 and 12).

4. That Mr. Madeiros indicated his approval of the checks for payment by the notation "OK E. Madeiros" on the face of the checks (Exhibit 11).

5. That Herman Worth, the teller at the bank, paid $38,000 in cash to Mr. Baskin on December 3, 1947 (Exhibit 11).

And that is as far as this proof could possibly go. It does not show what Mr. Baskin did with the cash.

Did he bring it back to the office of Mr. Heller, as was his practice? This is the only independent testimony in the record of what Mr. Baskin did with cash received when he went to the bank. Any other inference is pure speculation.

The vital testimony of Mr. Baskin was that early in December, 1947, accompanied by appellant, he went to the bank and there obtained $38,000 from the teller Wirth which he immediately counted out and turned over to appellant. It is this testimony which must be corroborated.

For a case clearly in point and in complete accord with the contention of appellant we again respectfully direct this Court's attention to *United States v. Neff*, supra, where at page 306 the Court said:

> "In prosecutions for perjury the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant; the falsity must be evidenced by the testimony of two independent witnesses or by one witness and corroborating evidence, and in the absence of such proof the defendant must be acquitted. To sustain a conviction for perjury the evidence must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, *the latter must be independent of the former and inconsistent with the innocence of the defendant.* 'When the courts speak of corroborative evidence they mean *evidence aliunde*—evidence which tends to show the perjury independently.' Before submitting a perjury case to the jury the court must determine whether the quantitative rule of evidence has been satisfied. Where corroborative evidence is offered the court must rule, as a matter of law, whether it is sufficient—that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the falsity of the alleged perjurious statement; the credibility of the corroborative testimony is exclusively for the jury.
>
> "Applying the principles stated, we are of the opinion that the trial judge erred in denying defendant's motion for acquittal as to Count 1. He should have ruled as a matter of law that the evidence asserted by the government to be 'corroborative' of

> Woolley's testimony as to the defendant's attendance at a Communist Party meeting patently failed to meet the standards of proof long established in perjury cases. The 'corroborative' evidence did not independently establish the perjury charged in Count 1. It did not establish or tend to establish that the defendant had ever attended a Communist Party meeting. The mere circumstances that one has signed a Communist Party nominating petition is in no way 'evidence' that one has attended a Communist Party meeting. Nor does the circumstance that one is a Communist Party member establish that he or she ever attended a Communist Party meeting. The same is equally true with respect to the collection of dues for the Communist Party." (Italics supplied.)

The case of *Radomsky v. United States,* 9 Cir. 180 Fed. 2d 781 at 783 also bears upon this question. There the Court said:

> "* * * Merely because the evidence is documentary does not dispense with the requirement that it be direct and positive. See Allen v. United States, 4 Cir., 194 F. 664, 667-668, 39 L.R.A., N.S. 385. In the federal cases in which documents have been used to establish perjury, the documents have, for practical purposes, *directly* established the falsity of the statement under oath." (Italics supplied.)

These principles have been affirmed repeatedly and must be considered the law controlling of this case. See also:

> *United States v. Rose,* 3 Cir., 215 Fed. 2d 617, 624, 625;

Miranda v. United States, 196 F. 2d 408, 411;
Weiler v. United States, 323 U.S. 606, 65 S. Ct. 548, 550;
Hammer v. United States, 271 U.S. 620, 46 S. Ct. 603;
McWhorter v. United States, 193 F. 2d 982, 983, 985.

Bearing these principles in mind in conjunction with the presumption in favor of appellant's innocence and the further presumption that had Herman Worth been called to testify by the prosecution, his testimony would have been unfavorable to the government, it is eminently clear that Irving Baskin's testimony that appellant accompanied him to the bank in Oakland where he delivered $38,000 in cash to appellant stands alone and uncorroborated. True, there is independent evidence to support his testimony that Baskin personally went to the bank and obtained $38,000 in cash on December 3, 1947. True, other evidence tends to prove that appellant placed bets with Tiny Heller over a period of years and that there was a net win of $34,800 in favor of the account of Mr. Samish in November of 1947; however, these incidents are not within the scope of Irving Baskin's direct testimony and are not corroborative of Baskin's testimony as to the *disposition* of this money. There is nothing in this collateral corroborative evidence which is inconsistent with the delivery of $38,000 in cash to Mr. Heller at his office or to Arthur Samish or to any other person.

The asserted corroborative evidence in the instant case is not direct or positive or inconsistent with the innocence of the accused. It does not "of itself" prove guilt.

We respectfully submit that there is a total absence of independent corroborating evidence in this case inconsistent with the innocence of appellant and that, therefore, the Court below erred in denying each of appellant's motions for judgment of acquittal.

SPECIFICATION OF ERROR NO. 5.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF THE WITNESS F. W. WHITTED OVER OBJECTION OF APPELLANT.

The transaction involved in the alleged perjurious statement of the accused occurred on December 4, 1947. Of this transaction the witness, F. W. Whitted, had no knowledge whatsoever; nevertheless, he was permitted to testify at great length with relation to events, transactions and conversations which had occurred a year or more prior thereto. He was also permitted to testify as to the meaning of transactions and entries in exhibits in which he did not participate and of which he had no knowledge. The error arising in permitting such opinion and hearsay testimony is fully discussed in the argument on Specification of Error No. 6 pertaining to the testimony of the witness Rosalind Heller and will, therefore, not now be here discussed.

Repeated objections to the testimony of the witness Whitted were made by counsel for appellant (R. 101, 103, 104, 105, 106, 107, 108, 114, 115, 117, 118, 119, 120, 121) and a motion to strike the same (R. 171-172) was denied by the Court below (R. 176). Objections were interposed to Exhibit No. 10 which related to parlay bets made by

appellant with the witness in October of 1946 and to the testimony in explanation thereof on the ground that it was "incompetent, irrelevant and immaterial" (R. 106) and on the further ground that it was being admitted generally and that there was "no limitation being placed on the testimony as to its character or its purpose" (R. 107). The Court admitted Exhibit No. 10 in evidence and then instructed the jury as follows:

> "The Court. Yes. These cards which are being received in evidence, ladies and gentlemen, are admitted for the purpose of showing the size and character of those bets as of that particular time, and for no other purpose." (R. 108.)

Over objection of appellant, the Court admitted in evidence Exhibit No. 9. No foundation was laid for the introduction of this exhibit in evidence (R. 115) in that it was not shown when this record was prepared, where or how it was kept or that it was in any way intended as a permanent record of the business transactions of Mr. Heller (R. 116, 117).

With relation to Exhibit No. 2 the witness Whitted testified that he had seen Mr. Heller use it, not often, and that he usually used it at his home.

With relation to Exhibit No. 3, he testified that Mr. Heller used books of *that sort.* Then without further foundation and without any showing that Exhibit No. 3 was *in fact* a business record of Mr. Heller and without any showing that the witness had knowledge of this exhibit or the transactions reflected therein, over objection of appellant that his testimony was merely an opinion

and conclusion and hearsay (R. 119), he was permitted to testify as to the type of transactions recorded in this exhibit.

The vice in admitting the testimony of Mr. Whitted and Exhibits 9 and 10 lies in the fact that these exhibits and the testimony concerning the same had no relation whatsoever to the transaction of December 4, 1947, upon which the first count of the indictment was predicated. As a result, prejudicial injury came to appellant and the injury was aggravated by the failure of the Court to give appellant's requested instruction No. 12. All of this evidence, if admissible at all, was of necessity, limited in character and the jury should have been clearly so instructed before retiring to deliberate on its verdict.

SPECIFICATION OF ERROR NO. 6.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF THE WITNESS ROSALIND HELLER OVER OBJECTION OF APPELLANT.

The Court below erred in permitting the witness, Rosalind Heller, to testify (over repeated objections of appellant) as to the meaning of entries contained in Exhibits 2, 3, 4, 5, 6, 7 and 8 and in denying appellant's motion to strike such testimony from the record.

She testified that she was the widow of Zola (Tiny) Heller who had operated a betting commission during the years 1946 and 1947; that Exhibits 2, 4, 5, 6, 7 and 8 were business records kept by Zola Heller in the course of his business as betting commissioner and that Exhibit 3

was of a *type* kept by Mr. Heller (R. 135-137); that she had never used symbols to indicate the name of a bettor in recording bets (R. 139). *The witness, Rosalind Heller, then testified as to the meaning of initials, figures, dates and symbols contained in these exhibits* (R. 140-152).

On cross-examinaiton she testified that she had not personally made any of the entries in Exhibits 2, 3, 4, 5, 6, 7 and 8 (R. 154-157) and that she had nothing to do with any of the transactions in which these exhibits were involved (R. 154-157).

Appellant interposed numerous objections to the direct testimony of Rosalind Heller on the grounds that it was hearsay or her opinion and conclusion (R. 140, 142, 143, 145, 146, 148, 149, 150, 152). To illustrate, these numerous objections were in part as follows:

> "Mr. Zirpoli. May it please the Court, I will object to that as calling for an opinion and conclusion of the witness and hearsay.
>
> The Court. You are familiar with those books, are you not?
>
> The Witness. Yes.
>
> The Court. You know what anything means that is therein contained, do you not?
>
> Mr. Zirpoli. I will submit it is hearsay. She must have been informed by someone else or it is an opinion." (R. 140)

> "Q. What does that mean?
>
> Mr. Zirpoli. Same objection your honor." (R. 140)

> "Q. And would you refer, Mrs. Heller, to the first three pages of that document?

Mr. Zirpoli. I object to all this testimony as hearsay, Your Honor, on the grounds previously stated." (R. 142)

"It is written here, 'plus $34,800'." (Remember she did not make this entry and had nothing to do with it.)

"Q. What does that mean? A. That he won that.

Q. That the bettor won, or Mr. Arena won?

A. The bettor won.

Mr. Zirpoli. I have an objection here as to hearsay as to all of this testimony.

The Court. The objection will be deemed to run to all of this testimony." (R. 143)

"Mr. Zirpoli. Well, I will object to that as calling for the opinion and conclusion of the witness, and hearsay. These entries were not made by the witness, and she is giving an explanation of entries made by someone else and giving an opinion from that." (R. 145)

"Mr. Zirpoli. Your Honor, there is no foundation laid. It is hearsay, and calls for an opinion and conclusion of a witness." (R. 148)

These objections, timely made, were overruled and the testimony was permitted on the theory that one who is familiar with business records is entitled to explain the meaning of those records (R. 145). A timely motion to strike this testimony (R. 172) was denied (R. 176).

A fundamental principle which governs the admissibility of testimony is that a witness may testify only as to those facts which he knows of his own knowledge, that is which are derived from his own perceptions unless, of

course, such testimony comes within one of the well-defined exceptions to the above-stated principle. *Fox v. Order of United Commercial Travelers,* 5 Cir., 1952, 192 F. 2d 844, 846.

This question was considered in *Southern Ry. Co. v. Mooresville Cotton Mills,* 4 Cir., 187 F. 72, 73, and the question was framed by the Court as follows:

> "In other words, did the witness testify as to facts that were within his own knowledge, or did his testimony depend upon information received from another?"

In discussing the question the Court said:

> "It should be borne in mind that the witness testified that he did not prepare the statement and that he was not present when the cars were weighed. Thus, we are informed by the witness that his testimony was not as to facts within his own knowledge, but that his information was derived from a statement made by another in regard to a transaction about which he had no knowledge whatsoever. * * * Evidence of this character is clearly incompetent."

Applying this principle to the testimony of Mrs. Heller we see that at most she was familiar with Exhibit 2, as a book kept by Mr. Heller in his handwriting, that Exhibit 3 was a record of a *type* (or sort) that Mr. Heller kept and that it is in his handwriting (R. 135), that Exhibits 4, 5, 6, 7 and 8 were business records of Mr. Heller kept in his handwriting. This is her complete and only knowledge as to these records.

On cross-examination as to these records she testified that she did not personally make the entries in and did not handle any of the transactions reflected in Exhibit 2 (R. 155, 156); that she did not personally prepare any part of and did not personally handle or participate in any part of the transaction reflected in Exhibit 3 (R. 156); that she did not personally prepare any part of and did not personally have anything to do with Exhibits 4, 5, 6, 7 or 8 or the transaction reflected therein (R. 156-157).

Thus it is apparent that Mrs. Heller did not have adequate knowledge of these books and records to make her a competent witness to testify as to the meaning of the entries therein.

We do not concede that her testimony was sufficient foundation to admit these exhibits in evidence under Section 1732, Title 28 U.S.C., and we most emphatically assert she was not competent to testify as to the meaning of the entries therein. The trial Court must have been of the same mind for in admitting Exhibit 3 (and 4 and 5) in evidence it did so for the "limited purpose of being an exemplar of certain business records" kept by Mr. Heller (R. 136).

But even if we were to concede that sufficient foundation was laid to admit the exhibits themselves in evidence it does not follow that the witness is thereafter rendered competent to testify as to the contents or meaning of the contents of such records. As was said by the Court in *United States v. Quick,* 3 Cir., 128 F. 2d 832, 838,

> "The statute was intended to render admissible in evidence books and records, made in the usual course

of business, without further authentication, but it was not intended to make book entries the touchstone by which incompetent oral testimony would become competent."

In *United States v. Compagnaro,* 63 F. Supp. 811, 815, the Court said:

"It should be noted that there is statutory authority for permitting the government to prove facts by offering in evidence a copy of the government records under the seal of the department. * * * However, even this statute does not permit the contents of government records to be proved by parol testimony as was here done. *Nock v. United States,* 2 Ct. Cl. 451."

See also:

Phillips & Benjamin Co. v. Ratner, 2 Cir., 207 F. 2d 372, 375, 376;

Rosenthal v. M'Graw, 4 Cir., 138 F. 721, 724;

Barnett v. Aetna Life Ins. Co., 3 Cir., 139 F. 2d 483, 485.

The argument of the prosecutor that business records always require some type of interpretation by some person familiar with them (R. 145) and the theory upon which Mrs. Heller was permitted to testify assumes the very facts in question. The rule propounded by the government does not obviate the necessity that the witness must testify as to facts which she knows of her own knowledge—the product of her own perception, as contrasted to her opinion or what may have been related to her by someone not before the Court.

As we said before, Mrs. Heller had nothing to do with the entries or the transactions therein reflected. She did not know whether they were true or accurate, she did not know when they were recorded, she did not supervise or control their entry or preparation in any way. These entries, such as "J.A.", "S.A.", "Jinnie A.", "A.C.T.", "Jimmie A", "to Cash", "W.B.", "off", or any such symbol or remark contained therein, were made by Mr. Heller and he *alone* participated in the events and transactions reflected therein. Mrs. Heller can speculate as to what these entries meant to Mr. Heller, she can guess as to what was intended by the entrant of these words, symbols and initials, she can even have personal knowledge of what was told to her by Mr. Heller as to the meaning of these records, but this does not render competent her testimony as to what actually was intended by Mr. Heller. She cannot testify of her own knowledge as to the true meaning of any of the entries contained in the exhibits.

To permit her to so testify is to permit hearsay upon hearsay or to give an opinion and conclusion upon hearsay. Such is not the law.

See:

Peightel v. United States, 8 Cir., 49 F. 2d 235, 237, 238;

D. P. Paul & Co. v. Mellon, 24 F. 2d 738, 740.

We, therefore, respectfully submit that the Court below erred in admitting her testimony over objections of appellant; that it erred in denying appellant's motion to strike this testimony; and that the rights of appellant were so prejudiced thereby as to require a reversal of the judgment of the Court below.

SPECIFICATION OF ERROR NO. 7.

THE COURT BELOW ERRED IN ADMITTING IN EVIDENCE EACH OF THE FOLLOWING GOVERNMENT EXHIBITS: NOS. 2, 3, 4, 6, 7, 9, 10 AND 15.

Each of these exhibits will be separately considered.

Exhibit No. 2: The only foundation for the admission of Exhibit No. 2 in evidence consists of the following:

a. The testimony of Irving Baskin that he had seen the book before, that the entries therein are in the handwriting of Mr. Heller, that it is a running account of bets that were made during the day and that he had seen Mr. Heller make entries in the book. He further testified that he was not the custodian of the books, that he did not prepare any of them but that at one time he had turned them over to the Internal Revenue at the request of Mr. Heller.

b. The testimony of F. W. Whitted that this exhibit was a volume used by Mr. Heller for monthly business, that he had seen him use it, not too often, that he usually used it at his home and that the handwriting in the book was that of Mr. Heller.

c. The testimony of Rosalind Heller that this book was in the handwriting of her husband, that she saw him make entries in it on many occasions and that it was a recording of his accounts.

An objection was made to the introduction of this exhibit in evidence on the ground that no foundation was laid therefor (R. 135).

We respectfully submit that the evidence to justify the admission of this exhibit in evidence was inadequate. We

recognize it is unnecessary to call as witnesses the parties who made entries kept in the regular course of business. None of the three witnesses who testified had anything to do with Exhibit No. 2 or the transactions reflected therein nor did they have any supervision or control over the keeping of the same. There is no showing of any character as to when the entries were made or any showing from which one might conclude that they were truly or accurately kept. Nor was there any showing that it was Mr. Heller's regular course of business to keep such records. Under the circumstances, the foundation laid was inadequate and Exhibit No. 2 should have been excluded from evidence and the motion to strike the same (R. 172-173) should have been granted.

Exhibit No. 3: While Exhibit No. 3 was admitted in evidence "for the limited purpose of being an exemplar of business records kept by Mr. Heller" (R. 136) nevertheless in the subsequent treatment of this exhibit both the Court and, particularly, the government in its closing argument treated this exhibit as though it were in evidence for all purposes (R. 188, 189) thereby unequivocally prejudicing appellant's case before the jury. No foundation was laid for the admission of this exhibit in evidence for such general purpose. There was no showing of any kind that it was in fact a business record of Mr. Heller kept in the usual course of his business and the only testimony on this score is the following:

Testimony of Irving Baskin:

"Mr. Schnacke. Q. Now, sir, I will show you another book that is in the form of something like a sales book. Have you ever seen that book before?

A. I have seen *books like this,* yes.

Q. And you recognize the handwriting in that book? A. Yes, sir.

Q. Whose handwriting is that? A. Mr. Heller's.

Q. Was that book *of a type* used by Mr. Heller as a business record? A. Yes, sir.

Q. Did he use sales books *of that sort?*

A. He would jot down the bets as they come over the telephone.

* * * * * * *

Mr. Schnacke. Q. You have seen him with *books of that type,* have you? A. Yes, sir.

Q. And you recognize that as his handwriting?

A. This is his handwriting.

Mr. Schnacke. I will ask that the book identified by the witness be marked Government's Exhibit next in order for identification.

The Court. So ordered." (R. 83)

Testimony of F. W. Whitted:

"Mr. Schnacke. Q. Have you ever seen him work on books like that, sir? A. Many times.

Q. And did he use books *of that sort* to reflect a certain type of transaction? A. Yes, sir.

Mr. Zirpoli. Object to that as calling for the opinion and conclusion of the witness, and hearsay as to what it would reflect.

The Court. If he knows, the answer may stand. Do you know that?

The Witness. Yes, sir.

Mr. Schnacke. Q. What type of transactions were recorded in books of that sort?

Mr. Zirpoli. Same objection, Your Honor.

The Court. Same ruling; overruled.

A. Single bets on different games.

Mr. Schnacke. Q. And that is a distinction between single bets and the type of parlay that you have been speaking of before, is that right? A. Yes, sir.

Q. And you recognize the handwriting on that?

A. Yes, sir.

Q. As whose? A. Tiny Heller's." (R. 119, 120)

Testimony of Rosalind Heller:

"Mr. Schnacke. Q. Mrs. Heller, I will show you Government's Exhibit No. 3 for identification. Are you acquainted with the handwriting that appears on that record? A. Yes.

Q. And is that *a record of a type* maintained by Mr. Heller? A. Yes.

Q. And have you ever seen him prepare records *of that sort?* A. Yes.

Q. I take it you do not recall whether or not you saw that particular record prepared or not, is that right? A. I saw most of this record.

Q. And you say that that is in Mr. Heller's handwriting? A. Yes.

Q. I notice inserted in that is an adding machine tape. Do you know how that tape would have come in there? A. Well, this is the figures.

Q. Is that the figure at the bottom?

A. I don't know who taped it off.

Q. But the writing at the bottom is? A. Yes.

Q. A total figure is there, is that right? A. Yes.

Q. And those figures on Page 74 and the language there is his, is that right? A. Yes.

Mr. Schnacke. I will ask that Government's Exhibit 3 for Identification be received in evidence.

Mr. Zirpoli. I will object to its receipt in evidence, if Your Honor please, on the ground no proper foundation has been laid therefor. There has been no

showing what it represents, any period of time, or any other connection.

The Court. It will be admitted for the limited purpose being an exemplar of certain business records which kept by Mr. Heller, and having been further identified for that purpose only.

Mr. Zirpoli. May I respectfully suggest that even the preceding records be received for such purpose only?

The Court. All right, I will admit those for the same purpose." (R. 135, 136)

Under the circumstances it is obvious that no foundation was laid for the admission of this exhibit in evidence and that it was prejudicial error to permit it to be thereafter considered and treated as though it were in evidence for all purposes. The motion to strike this exhibit from the record (R. 172, 173) should have been granted.

Exhibits Nos. 4 and 5: The same objection applies to Exhibits 4 and 5. The objection and ruling of the Court on these two exhibits was as follows:

"Mr. Zirpoli. Same objection, Your Honor; irrelevant and immaterial in that no showing is made as to their materiality, no foundation laid for their admission in evidence.

The Court. Objection overruled. They will be received subject to the same limitation, that I have heretofore described.

(Whereupon documents previously marked Government's Exhibits 4 and 5 for Identification were admitted into evidence.)" (R. 137)

Thereafter the prosecution was permitted to and did treat these exhibits and argued with relation to the same

(R. 191) as though they were admitted in evidence for all purposes. Again the appellant was unequivocally prejudiced thereby.

Exhibits Nos. 6, 7 and 8: Exhibits Nos. 6, 7 and 8 constitute three checks, one dated October 28, 1946 (Exhibit No. 6), another dated October 30, 1946 (Exhibit No. 7) and the third dated December 3, 1947 (Exhibit No. 8). The only foundation laid for the admission of these three checks in evidence was:

a. The testimony of Irving Baskin that these checks were in the handwriting of Tiny Heller (R. 86).

b. The testimony of Rosalind Heller that these checks are represented by check stubs in Exhibits Nos. 4 and 5 and that they are in the handwriting of Mr. Heller (R. 137).

The Court admitted these exhibits in evidence (R. 138) over objection of appellant that no foundation had been laid to justify their admission in evidence (R. 138). In admitting them in evidence the Court did so subject to motion to strike (R. 138). A subsequent motion to strike these exhibits (R. 172, 173) was denied.

It is respectfully submitted that certainly Exhibits 6 and 7 should not have been admitted in evidence and the motion to strike the same should have been granted. Exhibit No. 8, likewise, should have been stricken from the record although there was subsequent testimony to tie Exhibit No. 8 in with Exhibit No. 11.

Exhibits Nos. 9 and 10: Exhibits 9 and 10 admitted in evidence under the testimony of the witness F. W.

Whitted and heretofore discussed under Specification of Error No. 5 had no relation to the alleged perjurious statement of appellant and related to transactions occurring at least one year prior to December 4, 1947. Under the circumstances, these exhibits were not admissible in evidence for any purpose and should have been stricken on motion of appellant (R. 172, 173).

Exhibit No. 15: Exhibit No. 15 is an excerpt of the testimony of James Arena before the Grand Jury and relates to transactions had with the witness, F. W. Whitted, at least a year prior to the transaction involved in the alleged perjurious statement of appellant. The objection to the admission of this testimony in evidence was stated by counsel for appellant as follows:

> "Mr. Zirpoli. Yes, Your Honor. And, may it please the Court, with relation to the reading of the other portions of the transcript into the record, I shall at this time, I would like to interpose an objection to the reading thereof, Your Honor, on the ground that the remaining portions of the transcript to which he now makes reference are irrelevant and immaterial, that no foundation has been laid to justify its admission in evidence, and it is not in corroboration of the specific charges laid in the respective counts of the indictment; and on the further ground at most they constitute circumstantial evidence which I submit under the rulings of the Ninth Circuit would not be proper evidence of the falsity of the specific counts of the indictment.
>
> The Court. Overruled." (R. 168)

These objections were valid on all the grounds above quoted and the admission of this portion of the transcript

of the testimony of appellant before the Grand Jury, without limitation, unquestionably prejudiced appellant in the minds of the jurors. It pertained to a purely collateral matter that had no relationship to the falsity of the statement involved in the first count unless, of course, the government is prepared to concede that the first count alleges more than one offense in which event the indictment should have been dismissed.

SPECIFICATION OF ERROR NO. 8.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 8 IN ITS ENTIRETY AND AS PRESENTED.

This requested instruction which the Court below refused to give in its entirety read as follows:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath, and circumstantial evidence of such falsity, no matter how persuasive, is insufficient." (R. 44)

Exception was taken to the failure of the Court to give this instruction in its entirety. That exception was stated as follows:

> "Mr. Zirpoli. May it please the Court, at this time I respectfully object to the failure of the Court to give the defendant's requested instruction No. 8 to the effect that circumstantial evidence is insufficient. I cite the case of Radomsky vs. United States. I feel it has peculiar application to this case because of the circumstantial nature of much of the evidence.

The Court. The Ninth Circuit held that all evidence, whether circumstantial or direct, may be considered.

Mr. Zirpoli. Yes. I cite this case because it was a Ninth Circuit case." (R. 232)

The Court instructed the jury as follows:

"In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidenced by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted." (R. 230)

It was the failure of the Court to add the language, "and circumstantial evidence of such falsity, no matter how persuasive, is insufficient" to which we excepted. This exception was well taken and the authority therefor is *Radomsky v. United States,* 9 Cir., 180 F. 2d 781, 782, wherein the Court said,

"The Court, in accordance with the general rule, instructed the jury that in order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement under oath, and that circumstantial evidence of such falsity, no matter how persuasive, was insufficient. This instruction was not objected to by the Government and the case was tried on that theory of the law. No contention is here made that such is not the law as applied

by the federal courts. Our problem, therefore, is to determine whether the evidence in this case is insufficient to meet the requirement in perjury cases."

SPECIFICATION OF ERROR NO. 9.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 10.

This requested instruction, which the Court below refused to give, reads as follows:

> "To sustain a conviction of perjury on either count of the indictment, the evidence as to such count must be strong, clear, convincing and direct. Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant. When I speak of corroborative evidence I mean evidence which tends to show the perjury independently." (R. 44, 45)

The instruction given by the Court below on this score (R. 230) was inadequate in that it failed to set forth the requirement that the corroborative evidence must not only be independent of the testimony of the single direct witness, but also *inconsistent with the innocence of the defendant.* The instruction given by the Court was erroneous for the further reasons herein discussed under Specification of Error No. 12. As authority for his position, appellant cited *United States v. Neff,* 3 Cir., 212 F. 2d 297, 306, 307 (R. 45) wherein the Court said:

> "* * * To sustain a conviction for perjury the evidence must be strong, clear, convincing and direct.

Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, *the latter must be independent of the former and inconsistent with the innocence of the defendant.*"

SPECIFICATION OF ERROR NO. 10.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 11.

This requested instruction which the Court below refused to give reads as follows:

> "Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable—not merely probable—conclusion of falsity. The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof." (R. 45)

This was a proper and indispensable instruction since corroborating evidence in a perjury case which leads to a mere probable conclusion of falsity is not enough.

This requirement of the law was completely ignored by the Court below and it refused to correct its error in this respect when appellant directed the Court's attention thereto in his exceptions (R. 233). Appellant stated that such instruction was peculiarly adaptable to the evidence in this case and cited as his authority *United States v.*

Neff, supra, from which the requested instruction was taken verbatim (page 308 of 212 F. 2d).

Failure to give this instruction was clearly prejudicial and alone grounds for a reversal of the judgment of the Court below.

SPECIFICATION OF ERROR NO. 11.

THE COURT BELOW ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 12.

This requested instruction which the Court below refused to give reads as follows:

> "I have heretofore received in evidence acts and declarations and exhibits relating to the transactions of the defendant other than those covered by the statements alleged in the indictment to have been made under oath by the defendant, and at that time I instructed you that such evidence was received for the sole purpose of throwing light upon the intent or motive of the defendant or to show prior design or plan of the defendant, and not for the purpose of showing the falsity of the specific statements attributed to him in the two counts of the indictment. Nothing I said during the trial and nothing I state in these instructions is to be construed by you to permit the consideration of such evidence for any other purpose." (R. 45, 46)

Much of the evidence coming from the witnesses, W. F. Whitted and Rosalind Heller, and, particularly, Exhibits 2, 4, 6, 7, 9, 10 and the transactions therein reflected, were completely unrelated in time or circumstance to the transaction involved in the perjury charge against the

accused. Appellant was, therefore, entitled to have the foregoing instruction fully and correctly given to the jury.

True, the Court below instructed the jury as follows:

> "Now, the Court permitted evidence from which you could find that the defendant made false statements to the Grand Jury other than the false statements contained in the indictment. Such evidence, if believed by you, is to be considered by you only insofar as you may find it bears upon or relates to the intent or willfulness of the defendant with respect to the false statements charged in the indictment.
>
> "You are not to consider the evidence of other false statements made by the defendant to the Grand Jury, if they are found to be false by you, unless you find beyond a reasonable doubt that the defendant made the statements charged in the indictment and that the falsity of those statements was proved in the manner which I have heretofore instructed you is required. It is not to be otherwise considered by you." (R. 230, 231.)

This was a vague, indirect and incomplete approach to the collateral evidence in this case, which, if not properly and clearly limited, would only tend to confuse the jurors and prejudice appellant in their minds. The requested instruction went to "acts and declarations and exhibits relating to transactions of the defendant other than those alleged in the indictment." The instructions of the Court as given did not go far enough and did not cover these additional and clearly collateral matters, which were not reflected in Mr. Arena's testimony before the Grand Jury.

SPECIFICATION OF ERROR NO. 12.

THE COURT BELOW ERRED IN GIVING THE FOLLOWING INSTRUCTION TO THE JURY.

"By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy."

The exception of appellant reads as follows:

"This is my objection thereto, may I respectfully submit to Your Honor, that the instruction as given leaves the impression that anything the witness who testified directly to—if anything she says is corroborated, that alone is enough.

"I submit that it is not the test, and the test is that the corroboration must be on the direct testimony which relates to the falsity of the very charge with which the defendant is accused; and that if the corroboration is to something that is not as to the actual falsity of the thing he is accused of, that is not adequate corroboration, and to that extent I submit the instruction is inadequate and erroneous." (R. 233-234.)

This exception was well taken.

In considering this question, the Court in *United States v. Neff*, supra, 306, 307, said:

"In prosecutions for perjury the uncorroborated oath of one witness is not enough to establish the *falsity* of the testimony of the defendant; the *falsity*

must be evidenced by the testimony of two independent witnesses or by one witness and corroborating evidence, and in the absence of such proof the defendant must be acquitted * * * Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former *and inconsistent with the innocence of the defendant.* 'When the courts speak of corroborative evidence they mean *evidence* aliunde —evidence which tends to show the perjury independently.' * * * Where corroborative evidence is offered the Court must rule, as a matter of law, whether it is sufficient—that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the *falsity* of the alleged perjurious statement." (Italics supplied.)

See also:

McWhorter v. United States, 5 Cir., 193 F. 982, 985;
United States v. Hiss, 2 Cir., 185 F. 2d 822, 824;
Fraser v. United States, 6 Cir., 145 F. 2d 145, 151;
United States v. Buckner, 2 Cir., 118 F. 2d 468;
United States v. Rose, 3 Cir., 215 F. 2d 617, 624-625.

The variance between the instructions as given on this point and the law as to what constitutes corroborative evidence is obvious, particularly when considered with regard to the purpose of the "two witness" rule. The instructions given *place emphasis upon corroboration of the testimony of the witness or evidence to substantiate his testimony.* Pursuant to this type of instruction a jury could properly find corroboration of the testimony of a single direct witness even though not one scintilla of corroborating evidence has been offered to prove the alleged *falsity* of the defendant's statement. It permits a con-

viction on corroboration of collateral matters testified to by the direct witness. Such is not the law.

The error was aggravated by the example given by the Court below when in its instruction it said, "such as a bank record or check or business record." This example more than anything appellant could say proves the error of the Court's instruction.

In this case, Exhibit No. 11 could very well corroborate Mr. Baskin's testimony as to the *receipt* of $38,000 in cash, but it is not corroboration of the *disposition* of the cash, turning over of $38,000 by Baskin to appellant. The falsity here involved is not the receipt of the $38,000, but the turning over of $38,000 in one thousand dollar bills to appellant; hence, the jury under the Court's erroneous instruction, could very well conclude that Baskin was corroborated by the bank records as to the receipt of the $38,000 and believing this was corroboration could find appellant guilty without ever appreciating that the fact requiring corroboration was the turning over of the money by Baskin to appellant.

A stronger case of prejudice could not be made out.

The cases cited by appellant are clear in stating that the corroborating evidence must prove the *falsity* of the testimony of the defendant independent of the testimony of the direct witness. These cases place emphasis upon *proof of the falsity of the* defendant's testimony.

The rule as applied by the cases cited by appellant takes into account the reason for the "two witness" rule and looks through the cloud cast upon it by the same but misnomered rule "of corroboration", that reason basically being to prevent convictions for perjury by an oath against

an oath. Were the law otherwise, a witness for the prosecution might very well testify truthfully as to matters collateral to the alleged perjurious statement and be in corroboration of such testimony, yet himself be guilty of giving false testimony in contradicting the statement of the defendant. We repeat the instruction as given by the Court below would allow conviction upon corroboration of the direct witness' testimony as to collateral matters without any corroborating evidence as to the falsity of the defendant's statement.

Assuming the propriety of the first part of the Court's instruction (that which preceded the objectionable instruction), the influence which the latter instruction had upon the minds of the jurors must not be underestimated for as was said in *Ballenback v. United States,* 326 U.S. 607, 66 S.Ct. 402, 405,

> "* * * 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

And later the Court said,

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Certainly the trial Court's instructions as to corroboration were equivocal. That portion of the instruction which deals specifically with corroborative evidence is a glaring

misstatement of the law. When considered with regard to the general instruction immediately preceding it and the great emphasis placed upon the necessity for corroborative evidence by respective counsel in their arguments to the jury (R. 185, 186, 187, 188, 189, 190, 191, 192, 197, 202, 205, 206, 208, 209, 210, 211, 213, 214, 215, 217, 218, 221) we must logically conclude that the jurors were eager to be enlightened as to what specifically constitutes corroborative evidence. The above-quoted portion of the instructions of the Court below was food for their hungry minds. We cannot but believe that with this equivocal (and we submit, erroneous) instruction the jurors were left to their deliberations with a clear misstatement of the law to guide them on a vital issue. It would be pure fantasy to conclude that the jurors did not rely upon this erroneous instruction in arriving at their verdict of guilty.

The trial Court erred in instructing the jury as to what constitutes corroborative evidence and on this ground alone the judgment of the Court below should be reversed.

CONCLUSION.

Clearly, the multiple errors committed by the Court below in this case present an array of individual and combined injury and prejudice, which we respectfully submit call for reversal.

Dated, San Francisco, California,
February 23, 1955.

Respectfully submitted,
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C. Harold Underwood,
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